U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

B6

[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 09 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

identifying data deleted to prevent clearly unwarranted

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DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant/nightclub. It seeks to employ the beneficiary permanently in the United States as an assistant manager. A copy of a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel asserts that the director erred in failing to properly consider the salary of the employee.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii), provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

At the outset, it is noted that although the record contains a copy of an ETA 750, Part A, the original is not in the file. The record also does not contain either the original or a copy of Part B of the ETA 750. As such, the petition is not approvable as the record currently stands, even if the petitioner otherwise establishes eligibility. *See* 8 C.F.R. § 204.5(g)(1).

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 CFR § 204.5(d). Here, the Form ETA 750 was accepted for processing on March 29, 2001. The proffered wage as stated on the Form ETA 750 is $15.00 per hour, which amounts to $31,200 annually.

On the petition, the petitioner claimed to have been established in 1994, to have a gross annual income of approximately $297,000 and to currently employ seven workers. In support of its ability to pay the proffered wage, the petitioner initially submitted a copy of its Form 1120 U.S. Corporation Income Tax Return for 2000. It shows that the petitioner declared a net income of $8,485. Schedule L of the tax return shows that the petitioner had $29,552 in current assets and $3,722 in current liabilities, resulting in $25,830 in net current assets. Besides net

income, Citizenship and Immigration Services (CIS) will consider a petitioner's net current assets as an alternative method of demonstrating its ability to pay a proffered salary. Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A corporation's year-end current assets and current liabilities are shown on schedule L of a corporate tax return. If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on March 29, 2001, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically advised the petitioner that the evidence shall consist of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date. The director also instructed the petitioner to provide copies of the beneficiary's Wage and Tax Statements for 2001 and 2002, if applicable, copies of its 2001 and 2002 federal tax returns, or annual reports for 2001 and 2002.

In response, the petitioner submitted its corporate tax returns for the petitioner for 2001 and 2002. The tax returns reflect the following information:

	2001	2002
Net income	-$10,125	$ 2,414
Current Assets	$24,038	$22,253
Current Liabilities	$ 3,542	$ 4,367
Net current assets	$20,496	$17,886

The director reviewed the petitioner's financial data as shown on its tax returns and determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage as of the visa priority date. On April 30, 2004, the director denied the petition.

On appeal, counsel asserts that the employee's salary was already included in the petitioner's expenses and that the director erred in looking only at the petitioner's net income. The appeal was filed May 14, 2004. The appeal form, I-290B and accompanying correspondence from counsel indicates that counsel requested an additional thirty days to submit a brief and/or evidence. As of this date, nothing further has been received to the record.

To the extent that counsel is referring, on appeal, to the beneficiary's employment and wages paid by the petitioner, he is correct in stating that it should be considered in the determination of a petitioner's ability to pay the proffered wage. In reviewing a petitioner's ability to pay the proffered wage during a given period, CIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by

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[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, no credible evidence of employment and payment of wages by the petitioner to the beneficiary have been submitted to the record, although the director's request for additional evidence advised the petitioner that the beneficiary's W-2s for 2001 and 2002 would be considered, if applicable.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this matter, as noted above, the evidence failed to show that neither the petitioner's net income, nor its net current assets in either 2001 or 2002, was sufficient to pay the proffered salary of $31,200. The regulation at 8 C.F.R. § 204.5(g)(2) requires a continuing ability to pay the proffered wage beginning as of the priority date. The petitioner's evidence failed to demonstrate that it had employed and paid the proffered wage to the beneficiary and failed to demonstrate that either its net income or net current assets could cover the proffered wage.

Beyond the decision of the director, the AAO finds no evidence in the record indicating that the petitioner has provided the required proof of the beneficiary's relevant past employment experience. The copy of the ETA 750A, contained in the record, reflects that the beneficiary must have accrued two years of experience in the position offered of assistant manager. The record contains no letters from any past employers or trainers, pursuant to 8 C.F.R. § 204.5(g) describing the beneficiary's qualifying experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.